TABLE OF CONTENTS

	PAGE
Statement of Interest	1
Argument	6
Conclusion	10

TABLE OF CASES

Waterways Freight Bureau—Agreement, 277 I.C.C. 593	2

MISCELLANEOUS CITATIONS

Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Cong., 1st Sess., (1963) Part 2, p. 722, Line F, Columns (4) and (8)	3
Transport Statistics in the United States, Part 5	7, 8
National Transportation Policy, Transportation Act of 1940, 54 Stat. 899, c. 722, 49 U.S.C.	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 947

GULF-CANAL LINES, INC., COMMERCIAL TRANSPORT CORPORATION, VALLEY LINE SUPPLY AND EQUIPMENT COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., AMERICAN COMMERCIAL BARGE LINE COMPANY, corporations,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

STATEMENT OF INTEREST

Written consents to the filing of this brief *amicus curiae* have been obtained from counsel for all parties of record.

The Waterways Freight Bureau (Bureau) is a not-for-profit voluntary association of common carriers by barge, organized under Interstate Commerce Commission (Commission) approval pursuant to section 5a of the Interstate Commerce Act (Act) (49 U.S.C. section 5a).[1] Its members are the principal certificated barge lines operating on the Mississippi River System, including the Ohio, Missouri and Tennessee Rivers, the Illinois and Gulf Intracoastal Waterways, and other connecting and tributary waterways.[2] The Bureau's responsibilities include participation in proceedings before the Commission and the courts in cases, such as this, which involve issues of general concern to its members. Four Bureau members are among the appellants which filed the Jurisdictional Statement herein supported.[3] The remaining eight members of the Bureau are engaged in water carrier activities similar to those of the "certificated appellants" on the various rivers and waterways to which their respective certificates pertain.[4]

Although not parties to the arrangement which precipitated the proceeding before the Commission, other Bureau

---

[1] The 5a agreement was approved by the Commission in *Waterways Freight Bureau—Agreement*, 277 I.C.C. 593 (1950).

[2] The members of the Bureau are authorized by certificates granted by the Commission to conduct regulated interstate transportation services by water.

[3] Mississippi Valley Barge Line Company, Federal Barge Lines, Inc., American Commercial Lines, Inc., and Gulf-Canal Lines, Inc.

[4] Arrow Transportation Company, Coyle Lines Incorporated, Dixie Carriers, Inc., Igert, A. L. Mechling Barge Lines, Inc., The Ohio River Company, Sioux City and New Orleans Barge Lines, Inc., and Union Barge Line Corporation.

members have, for reasons subsequently stated herein, now joined in that arrangement.[5]

The Bureau's interest in this proceeding arises from these circumstances:

(1) The vast preponderance of inland water carriage is comprised of commodities which, potentially at least, are subject to handling under the section 303(b) "bulk" exemption.[6] Bureau members compete for this bulk traffic with non-certificated, bulk-exempt water carriers whose rates are unpublished, unregulated, and subject to change when and as those carriers may wish. To be competitive, Bureau members must also handle bulk traffic under the exemption. Many Bureau members have affiliated corporations which, like their unaffiliated bulk-exempt competi-

---

[5] Certain of the other Bureau members (John I. Hay Company and Coyle Lines Incorporated) took a position contrary to the appellants in the proceedings before the Commission, and John I. Hay (subsequently merged into A. L. Mechling Barge Lines, Inc.) continued to maintain that contrary position before the district court. All Bureau members now support appellants herein.

[6] The Commission has estimated that 78 percent of the tons moved by water carriers subject to its jurisdiction and 93 percent of the tons moved by exempt domestic water carriers are bulk-commodities subject to exemption if so handled as to meet the conditions to the application of section 303(b). The remaining seven per cent of exempt carriers' tonnage is presumably handled under other exemptions from water carrier regulation. "Transportation Act—1963," *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives,* 88th Cong., 1st Sess., (1963) Part 2, p. 722, Line F, Columns (4) and (8).

tors, operate exclusively in the bulk trades. Other members conduct operations in the bulk trades as an adjunct to their regulated non-bulk operations.

(2) The Commission interprets the "not more than three such commodities" condition to the section 303(b) exemption as violated when more than three bulk commodities *or* any non-bulk commodities are carried in a tow.

(3) Bureau members must, under this Commission-imposed "no-mixing" requirement, separate their bulk transportation claimed to be exempt under section 303(b) from their regulated non-bulk transportation.

(4) Bureau members hold certificates which authorize them to tow loaded or empty barges tendered for transportation (towage) as well as to transport cargo tendered for transportation in the carrier's barges (freightage). The operating authority for and rates applicable to towage and freightage are separate and distinct.

(5) Bulk-exempt carriers regularly engage Bureau members to tow, at published rates in the latters' fully regulated "mixed" tows, bulk-loaded barges for all or some portion of the through voyage contemplated in the former's freightage contracts with bulk shippers.

(6) Regulated towage for bulk-exempt carriers has become increasingly more important to Bureau members in recent years because it helps them to accumulate the larger, more efficient towloads which their increasingly more powerful towboats have made possible.

(7) The Commission ruling herein sought to be set aside would further extend the "no-mixing" requirement so as to deny certificated carriers the right to perform

regulated towage at published rates for any carrier claiming the bulk exemption.

(8) If Bureau members are denied this right, they will lose the substantial revenues now derived from such fully authorized transportation, and the over-all efficiency of bulk and non-bulk transportation will be seriously impaired.

It is our purpose in this brief to advise the Court of the importance of the issues presented by this appeal to the entire regulated water carrier industry, and, we believe, to the public served by this industry.

ARGUMENT

The "no-mixing" requirement which the Commission reads into section 303(b) lies at the core of the problem. The Commission insists that bulk transportation, so conducted as to be exempt under the plain words of section 303(b), forfeits that exemption if simultaneously carried with fully regulated non-bulk. This imposes an artificial hardship upon the carriage of both categories of traffic which penalizes the carriers who must immediately assume, and the shippers who must ultimately bear, the resulting increased costs of operations. If the Court sets aside this unwarranted legislation by interpretation, there is no occasion for passing upon the further question of whether the Commission's application of the "no-mixing" requirement is lawful. The Bureau can add nothing but its full concurrence to appellants' arguments with respect to the unlawfulness of the "no-mixing" requirement.

The Commission's application of the "no-mixing" requirement compounds the problems created by that requirement. It would terminate an efficient and heretofore lawful method of operations by which the certificated inland water carrier industry has attempted to adapt itself to the Commission imposed "no mixing" requirement, while preserving in some degree the economies of the larger tows achievable only by cooperation with bulk-exempt carriers. While certificated carriers may continue to tow non-bulk for each other under the "incidental" towage exemption provided by section 303(f)(2) (49 U.S.C. section 903(f)(2)), the Commission has now concluded that they may not tow

for bulk-exempt carriers. This conclusion is not rested upon any supposed gap in certificated carriers' authority to perform such towage, but upon the assertion that *their* mixing in *their* fully regulated tows operates vicariously to nullify the bulk-exempt carriers' claim to the section 303(b) exemption.

Bureau members account for 87 percent of the total regulated water carriage by class A carriers on the Mississippi River System.[7] In 1959, when the instant proceeding was first initiated before the Commission, Mississippi River System barge lines carried 47,529,587 tons of water-borne commerce at a total expense of $107,148,017. In 1964, the most current year for which statistics are available, they carried 30 percent more tonnage (61,745,175 tons) at substantially the same expense ($107,215,783).[8] This astonishing feat was made possible by the revolution in power equipment used on the inland waterways.

Inland water carriers can and do now transport, in a single flotilla of barges, as much cargo as can be handled in five of the heaviest trainloads operated by railroads. The increase in towload capacity changed the "no-mixing" requirement (particularly as the Commission now would apply it) from a minor irritant into a major deterrent to efficient water carriage. Separation of bulk and non-bulk was an unnecessary, but tolerable hardship in an era when 10-barge towloads were the norm. Now that separation needlessly and severely handicaps an entire industry which

---

[7] "Transport Statistics in the United States," 1964, Part 5, p. 24, prepared by the Bureau of Accounts, Interstate Commerce Commission. Class A carriers are those having average annual operating revenues exceeding $500,000. All Bureau members are in this class.

[8] *Id.* Years 1959 and 1964, p. 9 and p. 12.

can routinely transport 40-barge towloads (50,000 tons of cargo) on the lower Mississippi River.

The barge industry has been able to ameliorate the uneconomic effects of the "no-mixing" requirement through cooperation among certificated non-bulk carriers (which would remain lawful), but primarily by cooperation between such carriers and bulk-exempt operators (which the Commission's ruling herein would make unlawful)[9]. This cooperation has permitted frequent sailings in the larger tows produced by aggregating many carriers' barges. The first "agency" (group) tariff published by certificated towers especially for (although not limited to) towage of bulk cargoes for non-certificated carriers became effective shortly before initiation of the instant case before the Commission.[10] The three "certificated appellants" were the only parties to that tariff and undertook its defense on their own behalf. Subsequently, other Bureau members operating on the lower Mississippi River have become parties to that tariff.[11]

Under the bulk towage tariffs, Bureau members have been able to operate more efficient towloads approaching the capacity of their power equipment, and to derive profitable

---

[9] Revenues of certificated Mississippi River carriers from towing for each other increased 129 percent, 1964 over 1959, while total revenues increased only 11 percent. No comparable figures are published for towing by certificated carriers for bulk-exempt carriers—but the increase has been at least as great. *Id.*, pp. 6-7.

[10] E. H. Strobel, Agent, Tariff No. 1, I.C.C. No. A-1, effective July 16, 1959.

[11] Waterways Freight Bureau Tariff No. 5, I.C.C. No. 6, (Wesley A. Rogers, Agent), effective April 28, 1964.

revenues from the fully regulated towage and freightage rates which they assess upon all of the services they perform in those towloads. They desire to continue doing so. They object to a restriction upon their towage authorities, imposed for the first time 20 years after regulation by a strained and unjustifiable interpretation of the governing statutory language. They submit that such an interpretation cannot be reconciled with the clear mandate of the National Transportation Policy requiring that all of the provisions of the Act shall be so administered as to "promote safe, adequate, economical, and efficient service."[12]

The Bureau adopts *in toto* the positions stated by appellants on the three questions presented by this appeal, and the arguments presented in support thereof. In addition, the Bureau urges, for the reasons set forth hereinabove, that the questions presented by this appeal are of substantial importance, not merely to the appellants, but to the entire certificated barge industry and to the shipping public it serves. If the Commission's report and order are not set aside, as appellants request, the efficiency of water carriage on the Mississippi River System will be seriously and adversely affected.

---

[12] National Transportation Policy, Transportation Act of 1940, 54 Stat. 899, c. 722, 49 U.S.C., preceding sections 1, 301, 901 and 1001.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, and the case should be set for full hearing on the merits.

Respectfully submitted,

NUEL D. BELNAP
RICHARD J. HARDY
Attorneys for
Waterways Freight Bureau

BELNAP, SPENCER, HARDY & FREEMAN
Of Counsel

January, 1967